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California Adopts Use Tax to Protect Local Trade

Roger J. Traynor

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National Assn. of Tax Administrators
Report of December 1935 Conference

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P 13

THE NATIONAL ASSOCIATION OF TAX-ADMINISTRATORS

Some Highlights:

CALIFORNIA— Fred E. Stewart, member of the California State Board of Equalization and retiring president of the National Association of Tax Administrators, tells what accomplishments may be expected from co-operative effort in tax administration.

The Use Tax is an attempt to protect California merchants and industries. Prof. Roger J. Traynor, author of the California Use Tax law, explains it.

Dixwell L. Pierce, secretary of the California Board of Equalization, describes the system by which his state levies utility taxes.

Revenue increased by lower wine taxes, says Geo. M. Stout, Liquor Administrator.

MICHIGAN—"We spent more money for administration of our sales tax and it paid dividends of $16 for $1," reports Paul H. Reynolds, office manager of the Michigan Sales Tax Division.

ILLINOIS— Prof. S. E. Leland of the University of Chicago, a member of the Illinois State Tax Commission, calls for the development of merit service in tax administration as distinct from a political or spoils service.

Neil H. Jacoby, supervisor of the Legal and Research Division of the Illinois Department of Finance, outlines some of the difficulties to be met in the operation of the Use Tax.

J. W. Huston, Assistant Supervisor of the Legal and Research division of the Illinois Department of Finance, shows how explaining to the public the "reasons why" of taxes can help in administration.

INDIANA— Governor Paul V. McNutt of Indiana urges consolidation of local governmental units, selection of competent personnel, and fixing of executive responsibility, as methods of reducing public expenses.

Clarence A. Jackson, Director of the Indiana Gross Income Tax Division, tells of his state's experiences with the Gross Income Tax.

MISSISSIPPI— "We don't use the word 'enforce' in Mississippi; we try to get the taxpayers to pay as a public duty and through a co-operative arrangement," says A. H. Stone, chairman of the Mississippi Tax Commission and vice-president of the National Association of Tax Administrators. Mr. Stone also describes the operation of the Mississippi Homestead Exemption Law.

(Continued on Back Cover)

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PURPOSES OF THE ASSOCIATION

(From Article B of the Constitution)

The purposes of the Association shall be, through annual and other meetings and such ways as may seem advisable, to afford an opportunity to the members for freedom of discussion on tax and related matters and to interchange ideas on problems of administration and, in connection therewith, to assemble information pertaining to the various types of state tax laws as well as administrative methods employed in the different states, and the dissemination of such material as may be of benefit to the members in order to develop a co-ordinated administrative activity among the members; to work for the adoption of state tax laws that will prove most effective and will bring a greater equalization of the tax burdens in producing revenue with simplicity and uniformity and in connection therewith, to study and propose federal legislation that will tend to eliminate difficulties of enforcing state tax laws, and to do any and all things which will promote comity among the states in taxation.

Report of the
December, 1935, Conference

THE NATIONAL ASSOCIATION OF
TAX ADMINISTRATORS

INDIANAPOLIS, INDIANA
December 3 and 4, 1935

FOREWORD

IN PREPARING this report for publication, we have attempted to arrange the material in a manner that will make it most useful to tax administrators and others interested in tax matters.

To readers of the report who are not members of the Association it perhaps should be pointed out that the majority of articles contained herein are extemporaneous talks rather than prepared papers. We believe that whatever this form of expression may lose in polish it gains in frankness and freshness.

It will be noted that in the discussions printed at the close of the articles, there is a frequent difference of opinion among the administrators. These questions and answers represent the fulfillment of one of the foremost purposes of the National Association of Tax Administrators—to provide an open forum for free discussion of tax problems among those who must administer the tax laws of our country.

Organized in 1934 as the National Association of State Tax Administrators, the word "State" was dropped from the title by vote of the Association at the 1935 conference, and membership restrictions were extended in order that other tax officials might be eligible to membership.

C. A. JACKSON,
Secretary-Treasurer.

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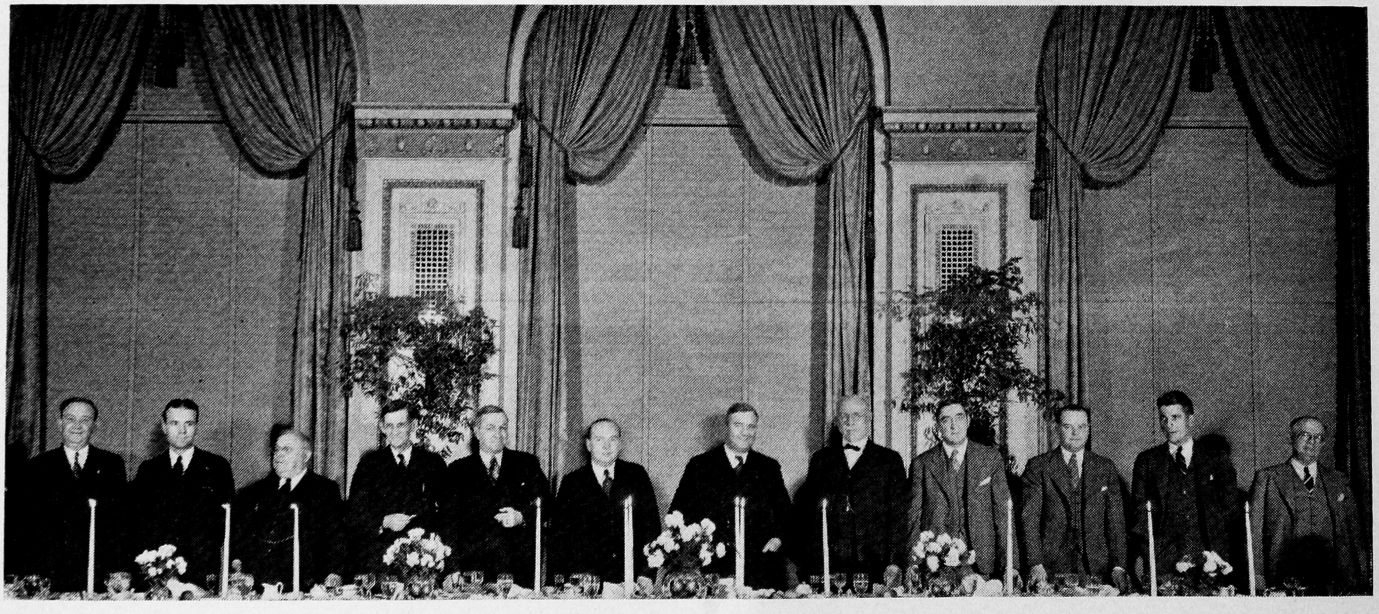
SCENES AT CONFERENCE BANQUET

GENERAL VIEW OF DINING ROOM



Persons at the speaker's table, from left to right, are: C. A. Jackson, Director, Indiana Gross Income Tax Division, and secretary-treasurer of the National Association of Tax Administrators; Carlton S. Dargusch, Vice-Chairman, Ohio Tax Commission; Harry Miesse, Secretary, Indiana Taxpayers' Association, Indianapolis; A. J. Maxwell, North Carolina Commissioner of Revenue and newly-elected president of the National Association of Tax Administrators; L. E. Wallace, Iowa Motor Vehicle Commissioner and president of the American Association of Motor Vehicle Administrators; Simeon E. Leland, University of Chicago, member of the Illinois Tax Commission and a member of the Executive Committee of the National Association of Tax Administrators; Fred E. Stewart, Member, California Board of Equalization, retiring president of the Association and chairman of the Executive Committee of the Association; Philip Zoercher, Chairman, Indiana Board of Tax Commissioners, and president of the National Tax Association; Forrest Smith, State Auditor, Missouri; W. C. Welch, Director of Taxation, South Dakota; T. C. Hutchinson, Assistant Director, Iowa Sales Tax Division; A. H. Stone, Chairman, Mississippi Tax Commission, and vice-president of the National Association of Tax Administrators.

California Adopts Use Tax to Protect Local Trade

With Security of Interstate Commerce Established, Action is Necessary to Remove Inequalities Suffered by Domestic Commerce, Author of Law Says

By ROGER J. TRAYNOR*
Member of the Faculty of the University of California and Consultant to the California State Board of Equalization

THE Commerce Clause of the Federal Constitution has served the development of interstate commerce long and well. The security of such commerce is now as firmly established as the unity of the nation, yet its special privileges continue even though the original reasons for them have disappeared. The tables are now turned, with domestic commerce in the less secure position. While hitherto maintaining itself under discriminatory tax burdens, it now struggles under their additional weight at a time when even slight differentials may make or break a business. All losses of local business to outside competitors result in losses of revenue not recouped by other states, for the corresponding gains to interstate business escape taxation altogether. More serious, however, is the permanent impairment of local business, which is at best only partially counterbalanced by increased orders from other states. (See the excellent study by E. M. Perkins, The Sales Tax and Transactions in Interstate Commerce, 12 North Carolina Law Review 99.) The rapid development of state sales taxation has rendered a serious situation critical, and the need for a remedy, which brought into being the National Association of State Tax Administrators, has become urgent. If state sales taxation is to continue, states must find some way of equalizing the competition which now threatens their sources of revenue as it threatens their local businesses.

The solution is in no sense to grant special privileges to local business, but to remove those special privileges from interstate business. Three obstacles stand in the way of such a solution: (1) repeated pronouncements by the United States Supreme Court that the regulation of commerce among the states, delegated to Congress by the United States Constitution, prohibits the application of state excise taxes with respect to transactions in interstate commerce; [Robbins *v.* Shelby County Taxing District (1886) 120 U. S. 489; Statenburgh *v.* Hennick (1889) 129 U. S. 141; Brennan *v.* Titusville (1894) 153 U. S. 289; Stockard *v.* Morgan (1902) 185 U. S. 27; Caldwell *v.* North Carolina (1903) 187 U. S. 622; Norfolk and Western Ry. Co. *v.* Sims (1903) 191 U. S. 441; Rearick *v.* Pennsylvania (1906) 203 U. S. 507; Dozier *v.* Alabama (1909) 218 U. S. 124; Crenshaw *v.* Arkansas (1912) 227 U. S. 389; Rogers *v.* Arkansas (1912) 227 U. S. 401; Stewart *v.* Michigan (1913) 232 U. S. 665; Davis *v.* Virginia (1914) 236 U. S. 697; Real Silk Hosiery Mills *v.* Portland (1925) 268 U. S. 325.] (2) decisions that a state cannot tax activities beyond its borders; [St. Louis Cotton Compress *v.* Arkansas (1922) 260 U. S. 346; Provident Savings Ass'n *v.* Kentucky (1915) 239 U. S. 103; Compania de Tabacos *v.* Collector (1927) 275 U. S. 87; Standard Oil Co. *v.* California (1934) 291 U. S. 242; Compare Palmetto Fire Insurance Co. *v.* Conn (1926) 272 U. S. 295; Graniteville Manufacturing Co. *v.* Query (1931) 283 U. S. 376.] (3) restriction of a state's collection functions to its own limits. [See Colorado *v.* Harbeck (1921) 232 N. Y. 71, 133 N. E. 357; Moore *v.* Mitchell (1929, C. C. A. 2d) 30 F. (2d) 600.]

Rate Same as Sales Tax

The California Use Tax Act (Cal. Stats. 1935, ch. 361) takes account of these conditions in its plan to put its own retailers on the same terms with out-of-state competitors. It imposes an excise tax of 3% of the sales price upon the storage, use or other consumption of tangible personal property purchased from retailers on or after July 1, 1935, for storage, use or other consumption in the state. The rate is thus identical with the sales tax rate. The act does not apply to property subject to the sales tax; it thus directs itself principally to that property purchased outside the state or in interstate commerce, and applies regardless of whether the retailer is located in the state or in another state or foreign country. Liability for the tax falls upon the person storing, using or otherwise consuming the property and is extinguished only when he pays the tax either to the retailer from whom he must receive a receipt or to the state when the retailer maintains no place of business in the state. Retailers in the first instance must collect the tax at the time of sale and make quarterly returns thereof. In all other cases the consumer must make such returns directly. Retailers who maintain no place of business in the state are neither required to collect the tax nor permitted to do so except upon certain conditions. The State Board of Equalization may require returns for other than quarterly periods. All retailers making sales of tangible personal property to California consumers are required to register with the Board.

It is the intent of the use tax merely to supplement the sales tax by imposing upon those subject to it a tax burden equivalent to that of the sales tax with the same specific exemptions in each case. The act accordingly limits the tax to the "*use* . . . of property *purchased for use* . . ." within the state. Problems requiring administrative interpretation must be analyzed in the light of this double condition. Circumstances might compel, for example, the use of property within the state not intended for such use at the time of purchase, and previously used elsewhere. Thus a family moving into California with furniture it had used for several years would clearly

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be exempt from the tax. Cases can arise, however, where a formal use elsewhere might disguise an actual intent to use within the state the property purchased. For the most part such an intent would reveal itself in the circumstances of the purchase and the subsequent use of the property. There could be little doubt that the use tax would apply to the use of an automobile purchased in Nevada by a California resident and registered in California shortly thereafter. Since the variety of possible situations could hardly be covered by a rigid rule or regulation doubtful cases must be submitted to administrative interpretation.

Legality First Question

The first question that arises is whether the Act imposes an unconstitutional burden upon interstate commerce either by levying a discriminatory tax, by charging certain retailers with collection, or by taxing the use of property in an interstate business.

It is now beyond doubt that the storage, use or other consumption of tangible personal property within the borders of a state is a proper subject of an excise tax, even though the property be of out-of-state origin. [Bowman *v.* Continental Oil Co. (1921) 256 U. S. 642; Hart Refineries *v.* Harmon (1929) 278 U. S. 499; Nashville C. & St. L. R. R. Co. *v.* Wallace (1933) 288 U. S. 249.] It might be argued, however, that the exemption of property subject to the sales tax constitutes a prima facie discrimination against interstate commerce. If the Act actually discriminated against goods of out-of-state origin, it would violate the commerce clause even though interstate transit had ceased and the goods had long since come to rest in the state. [Welton *v.* Missouri (1875) 91 U. S. 275; Bethlehem Motors Corporation *v.* Flynt (1921) 256 U. S. 421. See also Darnell & Son *v.* Memphis (1908) 208 U. S. 113.] If discrimination were to be determined solely from the four corners of the Act, there could be little doubt of its invalidity. The Supreme Court, however, repudiated this test in Gregg Dyeing Co. *v.* Query, [(1932) 286 U. S. 472. See also Vancouver Oil Co. *v.* Henneford (1935) 49 P. (2d) 14 holding valid, in reliance upon the Gregg Case a Washington tax essentially similar to the California use tax.] holding that other related statutes must be considered in conjunction with the one assailed as discriminatory. That case involved the validity of a South Carolina license tax upon gasoline imported from other states, and stored for future use within the state. Other South Carolina statutes imposed license taxes with respect to sales of gasoline within the state. The court declared:

"But appellants question the right to invoke other statutes to support the validity of the act assailed. To stand the test of constitutionality, they say, the act must be constitutional 'within its four corners' that is, considered by itself. The question of constitutional validity is not to be determined by artificial standards. What is required is that state action, whether through one agency or another, or through one enactment or more than one, shall be consistent with the restrictions of the Federal Constitution. There is no demand in that Constitution that the state shall put its requirements in any one statute. It may distribute them as it sees fit, if the result, taken in its totality, is within the state's constitutional power." (286 U. S. 472, 479)

Gregg Case Meets Objection

The California Use Tax operates in conjunction with the sales tax to exact from all consumers of tangible personal property within the state a tax amounting to 3% of the sale price of the property. The fact that the sales tax is in form upon the retailer, while the use tax is in form upon the consumer, affords no basis for distinguishing the Gregg case, since there was virtually the same difference between the South Carolina statutes involved in that case. Unless particular significance is attached to the fact that the latter statutes involved only one commodity, or to the special nature of that commodity, the Gregg case effectively meets the contention that the California Use Tax involves a forbidden discrimination by exempting property reached by the sales tax.

Even though the California Use Tax Act involves no unconstitutional discrimination in the light of the Gregg Case, the question remains whether it can constitutionally charge with tax collection those retailers maintaining a place of business within the state. Only by this method could the Act obviate the insuperable difficulties of collecting the tax exclusively from the numberless users of diverse commodities, and it finds authority for such a method in the recent Supreme Court decision in Monamotor Oil Company *v.* Johnson, [(1934) 292 U. S. 86. See also the cases holding that a state may require a national bank to collect a tax on shareholders that could not have been imposed upon the bank. Nat. Bank *v.* Commonwealth (1869) 76 U. S. (9 Wall.) 353; First Nat. Bank of Aberdeen *v.* County of Chehalis (1897) 166 U. S. 440; Merchants and Manufacturers' Nat. Bank *v.* Penn (1897) 167 U. S. 461; Home Saving Bank *v.* Des Moines (1907) 205 U. S. 503. See also Pierce Oil Co. *v.* Hopkins (1924) 264 U. S. 137 holding that a state statute requiring sellers of gasoline to collect a tax from their purchasers did not violate due process.] This case involved an Iowa statute requiring all distributors to collect a tax on the use of gasoline, regardless of whether the gasoline was sold interstate or intrastate. The court held that:

"The appellant, however, says that the state officials have required it to report and pay the tax on shipments made from Oklahoma direct to dealers in Iowa who are appellant's customers and in respect to such transactions the burden on interstate commerce is obvious. But if the gasoline so imported is intended to be used in Iowa for motor vehicle fuel it is subject to tax . . . The statute obviously was not intended to reach transactions in interstate commerce, but to tax the use of motor vehicle fuel after it had come to rest in Iowa, and the requirement that the appellant as shipper into Iowa shall, as agent of the state, report and pay the tax on the gasoline thus coming into the state for use by others on whom the tax falls imposes no unconstitutional burden either upon interstate commerce or upon the appellant." (292 U. S. 86, 94.)

Trend in Decisions Noted

It may be that in subjecting to a use tax that which could not be reached by a sales tax and in requiring a seller to collect the tax to which he himself could not be subjected the California Use Tax resorts to a measure of indirection. But the necessity of harmonizing the equitable purposes of the Act with established precedents compels the careful selection of its subject and the manner of its imposition. The act would seem particularly free from criticism on this ground in view of recent decisions evidencing a growing severity toward the special bounties enjoyed by interstate commerce. [See Wiloil Corp. *v. Pennsylvania* (1935) 294 U. S. 169. See also Eastern Air Transport Inc. *v.* South Carolina Tax Comm. (1932) 285 U. S. 147; Nashville etc. Ry. Co. *v.* Wallace (1933) 288 U. S. 249; Edelman *v.* Boeing Air Transport Inc. (1933) 289 U. S. 249.]

The commerce clause raises one more constitutional question with regard to the use tax, namely, its application to the use or storage of property subsequently used in interstate commerce. If the only use of the property within the state were

use in interstate commerce the tax would seem clearly inapplicable under the holdings in Helson & Randolph *v.* Kentucky [(1929) 279 U. S. 245) and Cooney *v.* Mountain States Telephone Co. (1935) 294 U. S. 384.] The Helson case held that a Kentucky tax on the sale, distribution or use of gasoline within the state could not apply to gasoline purchased outside the state, never stored therein, and used exclusively in interstate commerce. The Cooney Case invalidated a license tax on telephone companies measured by the number of telephones in intrastate use on the ground that all of the telephones were available and substantially used in interstate commerce. The Helson case involved a use in interstate commerce not preceded by any storage or local use in the state. The Cooney Case involved a use which might have been preceded by storage or local use neither of which, however, were subject to the tax.

California Act Specific

The California Act, on the contrary, specifically taxes such storage or use. The validity of such taxation was sustained in Nashville, Chattanooga etc. Ry. *v.* Wallace and Edelman *v.* Boeing Air Transport Company. [see Wiloil Corp. *v.* Pennsylvania (1935) 294 U. S. 169. See also Eastern Air Transport Inc. *v.* South Carolina Tax Comm. (1932) 285 U. S. 147; Nashville etc. Ry. Co. *v.* Wallace (1933) 288 U. S. 249; Edelman *v.* Boeing Air Transport Inc. (1933) 288 U. S. 249; Edelman v. Boeing Air Transport Inc. (1933) 289 U. S. 249.)

In the Nashville Case an interstate carrier purchased gasoline outside the state, stored it within the state and later withdrew it for use in interstate carriage. The court held it subject to a privilege tax on persons and corporations engaged in the business of selling, storing or distributing gasoline in the state on the ground that the power to tax the gasoline as property after coming to rest in the state includes the power to tax its storage and withdrawal. The court said:

"Here the tax is imposed on the successive exercise of two of those powers, the storage and withdrawal from storage of the gasoline. Both powers are completely exercised before the use of gasoline as an instrument of commerce and the burden is too indirect and remote from the function of interstate commerce itself to transgress constitutional limitations." (288 U. S. 249, 268.)

A similar use of gasoline in the Edelman Case was held subject to a tax on the use or sale of gasoline in the state. In holding that this tax imposed no unconstitutional burden on interstate commerce the court stated:

"As the tax has been administratively construed and applied, the tax is not levied upon the consumption of gasoline in furnishing motive power for respondent's interstate planes. The tax is applied to the stored gasoline as it is withdrawn from the storage tanks at the airport and placed in the planes. No tax is collected for gasoline consumed in respondent's planes either on coming into the state or on going out. It is at the time of withdrawal alone that 'use' is measured for the purpose of the tax. The stored gasoline is deemed to be 'used' within the state and therefore subject to the tax, when it is withdrawn from the tanks . . .

"A state may validly tax the 'use' to which gasoline is put in withdrawing it from storage within the state, and placing it in the tanks of the planes, notwithstanding that its ultimate function is to generate motive power for carrying on interstate commerce." (289 U. S. 249, 251.)

The Helson Case would clearly prevent the application of a use tax only where the interstate use, as in the case of rolling stock, preceded the introduction of the property into the state and continued thereafter. It seems clear in the Nashville and Edelman Cases, however, that once property has come to rest in the state, acts up to the very point of consumption were regarded as preliminary to the interstate use held not taxable in the Helson Case, and were not themselves immune from taxation. If the withdrawal of gasoline and the filling of tanks for immediate use in interstate commerce can be subjected to use taxation it is difficult to see how the storage or for that matter the installation of tangible personal property could be immune.

Limitation Avoids Problems

The limitation of the use tax to the storage, use or other consumption of property within the state avoids the problems of due process that might arise from the extension of a sales tax by consumer states, to interstate commerce under federal permissive legislation or otherwise. The privilege of selling and the act of sale would probably be located in the state of origin of the commodity thus rendering the selection of any other subject of a sales tax in the consuming state of dubious constitutionality. [St. Louis Cotton Compress *v.* Arkansas (1922) 260 U. S. 346; Provident Savings Ass'n *v.* Kentucky (1915), 239 U. S. 103; Compania de Tabacos *v.* Collector (1927) 275 U. S. 87; Standard Oil Co. *v.* California (1934) 291 U. S. 242; Compare Palmetto Fire Insurance Co. *v.* Conn. (1926) 272 U. S. 295; Graniteville Manufacturing Co. *v.* Query (1931) 283 U. S. 376.] In contrast, the storage, use or other consumption of property within a state is clearly within its jurisdiction to tax. [See Air Transport Inc. *v.* South Carolina Tax Comm.; Nashville etc. Ry. Co. *v.* Wallace; Edelman *v.* Boeing Air Transport Inc., (1933) 289 U. S. 249. See also Palmetto Fire Ins. Co. *v.* Conn.; Graniteville Mfg. Co. *v.* Query (1931) 283 U. S. 376; Bowman *v.* Continental Oil Co. (1921) 256 U. S. 642; Hart Refineries *v.* Harmon (1929) 278 U. S. 499; Nashville C. & St. L. R. R. Co. *v.* Wallace (1933) 288 U. S. 249.]

Property Tax, May Be Claim

It might be argued that the use tax is a property tax which, by virtually limiting itself to property of out-of-state origin, violates not only the commerce clause, but the uniformity provision of the state constitution. This interpretation of the use tax would look for its authority to Dawson *v.* Kentucky Distilleries Co. [(1924) 255 U. S. 288.] The court there held that a tax on the removal of whiskey from bonded warehouses in the state violated the uniformity provision of the Kentucky constitution. It declared:

"The whole value of the whiskey depends upon the owner's right to get it from the place where the law has compelled him to put it, and to tax the right is to tax the value. To levy a tax by reason of ownership of property is to tax the property." (255 U. S. 288, 294.)

In Bromley *v.* McCaughn, [(1929) 280 U. S. 138. See also Anderson *v.* McNeir (1927) 16 F (2d) 970, 974] however, the court sustained a federal gift tax against the contention that it was a property tax necessitating apportionment, on the ground that "a tax imposed upon a particular use of property or the exercise of a single power over property incidental to ownership is an excise which need not be apportioned." It contrasted this with the Dawson Case, holding that the latter supported the proposition that a tax "upon all the uses to which property may be put, or upon the exercise of a single power indispensable to the enjoyment of all the others, would be in effect a tax upon the property." The Dawson case thus raises certain questions. Upon how many uses could a tax be levied without becoming a property tax? What uses would be indispensable to the enjoyment of all others?

The interpretation of the use tax as a property tax was not advanced in any of the cases involving taxes on use or stor-

age. In any event, the California use tax does not apply to the use or storage of property to be resold, nor does it have the usual characteristics of a property tax. It does not recur annually, but falls only once on any specific property; it is not imposed on a fixed day; it does not, in other words, fall upon the owner "merely because he is owner, regardless of the use or disposition made of the property."

Even if it were a property tax it would still not constitute a discrimination against interstate commerce, in the light of the Gregg Case, so long as other taxes, property or otherwise, imposed a comparable burden upon domestic commerce. The second contention raised by the interpretation of the tax as a property tax would have no application in California, where the uniformity provision of the state constitution does not apply to personal property.

Collection Biggest Task

The most difficult problem for a state, however, is not the establishment of a non-discriminatory tax within its own jurisdiction, but the collection of such a tax. Any attempt to collect a use tax from countless individual users of commodities would involve so much supervision and expense as to vitiate the exercise of a state's jurisdiction over them. The users might have a clear responsibility for tax payment, but they could evade it by virtue of their numbers. The imposition of responsibility on a smaller group, however, would be equally ineffective if the state had no jurisdiction to enforce collection. While it would be desirable, for example, to localize collection through a comparatively small group of retailers, this would be precluded, since the members of such a group are subject to different jurisdictions. If a retailer had no place of business in the taxing state, he could be compelled neither to pay a tax imposed upon him nor to collect a tax imposed upon his local customers. A state could not normally send its officers into another state to audit the books of a retailer. It would probably find no remedy in its courts if the retailer had no attachable property within the state. It might thus be in the embarrassing position of requesting tax payments from out-of-state retailers which it could not collect in the event of refusal. Such a situation would be particularly undesirable where domestic consumers had themselves paid the tax to the retailers for remittance to the state.

The California use tax seeks to obviate these difficulties by localizing collection through retailers, but only so far as is consistent with its own jurisdiction. It requires collection from consumers on behalf of the state only from retailers maintaining places of business within the state, or others who upon proper showing have obtained the consent of the State Board of Equalization to collect the tax. While it is thus still compelled to exact tax payments directly from those purchasers from retailers without places of business within the state, it at least limits that group to a size susceptible to effective administration.

Act Provides for Service

In regard to civil actions for the enforcement of collection, the California act provides for service of process upon any agent or clerk employed in the state by any retailer in a place of business maintained by such retailer in the state, and the transmission by registered mail of a copy of the process to the retailer at his home office. The validity of such service upon a corporation engaged exclusively in interstate commerce, at least regarding those whose activities in the state transcend mere solicitation of orders, is assured by International Harvester Co. *v. Kentucky*. [(1916) 234 U. S. 579.] Quite recently Henry L. Doherty & Co. *v.* Goodman [(1935) 55 Sup. Ct. 553. See J. P. McBaine, Service upon a Non-Resident by Service Upon His Agent (1935) 23 California Law Review 482.] removed the doubts left by Holmes' opinion in Flexner *v.* Farson [(1919) 248 U. S. 289] regarding the validity of service upon a non-resident by service upon his agent. While the case did not involve interstate commerce, it would seem that once the propriety of service upon a non-resident by service upon his agent is established, the interstate character of the business should no more obstruct service upon individuals than service upon corporations. Once proper service is had, a judgment obtained in this state might form, although the question is still open, the basis of an action in the courts of another state. [See Wisconsin *v.* Pelican Ins. Co. (1888) 127 U. S. 265; Moore *v.* Mitchell (1929) 30 F. (2d) 600. Cf. People of State of New York *v.* Coe Mfg. Co. (1934) 112 N. J. L. 536, 172 Atl. 198, cert. den. (1934) 55 Sup. Ct. 89; (1935) 83 U. of Pa. L. Rev. 387; Hazelwood, Full Faith and Credit Clause as Applied to Enforcement of Tax Judgments (1934) 19 Marquette L. Rev. 10.) The Act is additionally implemented in this regard by making the tax to be collected by retailers a debt owing to the state, thus again attempting to meet the doctrine that one state cannot sue for taxes in the courts of another.

Reciprocation May Be Answer

The California Use Tax Act seeks by unilateral action to circumvent difficulties that might well be facilitated or abolished altogether by reciprocal action among the states. North Carolina has taken an excellent step in this direction by making its courts available for the enforcement of collection to any other states which would reciprocate that privilege. (1935) (North Carolina H. B. 332.) Much might also be accomplished by the exchange of similar privileges that seemed essential to effective tax collection. As matters now stand, even if the states, in order to subject interstate and intrastate commerce to the same burdens, had the power to tax all sales directly, they would still lack jurisdiction to enforce collection. Federal legislation itself could do little to remedy this situation without co-operative action from the states. No group could more appropriately encourage such reciprocal legislation than the National Association of Tax Administrators.

MR. SMITH (Missouri): Have California courts passed on your Use Tax Law yet?

PROFESSOR TRAYNOR: No, but Washington has a similar tax and the Washington Supreme Court has passed upon that Act, holding it valid so far as the State Constitution is concerned and so far as interstate commerce is concerned. That is in Vancouver Oil Company against Henneford. It is in 49th Pacific.

MR. SMITH: Another question: If I understood you correctly, if Mrs. Blivins, out here at Podunk, orders some red house slippers and a calico dress from Montgomery Ward & Company, in Chicago, you make an effort to collect that tax?

PROFESSOR TRAYNOR: Yes, she is supposed to return that tax to California, just as if she had bought it from a California retailer.

MR. REYNOLDS (Michigan): Professor, you mean to say that from each individual in California who orders from a mail order house in Chicago, an attempt is made by the state to collect that tax?

PROFESSOR TRAYNOR: That is right.

MR. REYNOLDS: From all individuals?

PROFESSOR TRAYNOR: That is right.

MR. REYNOLDS: I should think that that would be rather prohibitive.

PROFESSOR TRAYNOR: I expect it would be very difficult. It is undoubtedly a heroic task.

MR. PIERCE (California): As Professor Traynor pointed out, where that retailer maintains a place of business in the state, the law makes him responsible for the collection of it and, in the case of the two principal mail order houses—that is, Montgomery Ward and Sears-Roebuck—of course, they do maintain places of business in our state, retail stores. So, answering specifically Mr. Smith's question, in that case it would have been collected directly from the retailer and there would be no difficulty at all.

MR. REYNOLDS: Even if they maintain no branch in the state, you still attempt to collect it

MR. PIERCE: Where they have no branch in the state at all, as Professor Traynor said in his paper, then the problem is different because it would be useless to try to collect it from the seller in the other state, particularly where no tax liability would be in dispute in the other state.

PROFESSOR TRAYNOR: I think we have a sufficient number of retailers with places of business in the state to render this difficult problem workable. The large users of property, like the various corporations and utility companies and so forth, render the collection otherwise rather simple. So that reduces the users that we attempt to collect the tax from to a less formidable number, but I do recognize the force of that question. It is a very difficult problem; however, perhaps no more so that collecting an income tax. Many objections were made to the personal income tax on the same ground: that you ask individuals to make returns and tell you what their income is. Now, in time, I suppose that the force of that objection will be met just as it was in the case of the income tax.

Law Not in Courts

MR. SMITH: May I ask if you have had any difficulty in collecting this tax or has anyone resorted to the courts to stop you from collecting it?

PROFESSOR TRAYNOR: Not yet, no.

MR. SMITH: Now, the mail order house—the main house in Chicago—will notify its branch house in California that they have shipped a dress to Mrs. Blivins, at Podunk—is that the way it is handled—or that they have sold three dollars and forty-five cents worth of merchandise to her?

PROFESSOR TRAYNOR: The mail order branch in California is required to make the return.

MR. SMITH: And they get the information from the house in Chicago?

PROFESSOR TRAYNOR: Yes, that is right.

MR. MARTIN (New Jersey): I would like to ask if you can tell us whether there are any cases now pending in the Federal Court where the parties are carrying either the California or the Washington Use Tax to the United States Supreme Court.

PROFESSOR TRAYNOR: I think the Washington tax is going up, but I am not positive.

MR. ———: I would like to ask, Professor, what the penalty is in connection with this question of filing of returns, as far as the consumer is concerned, if the consumer fails to file a return.

MR. PIERCE: There is a ten per cent penalty.

MR. ———: Do you have a provision for civil action?

MR. PIERCE: Yes, there is a provision for civil action, too.

Branch Office Liable

MR. SMITH (Georgia): I don't know whether Mr. Smith, of Missouri, made that exactly clear, or not.

In the event property is sent from Sears-Roebuck & Company, at Chicago, and it is shipped direct from Sears-Roebuck & Company, Chicago, to the customer in California, then you, under your law, attempt to hold the branch office of Sears-Roebuck & Company, in California, responsible?

PROFESSOR TRAYNOR: That is right. Yes, our theory is that, so far as possible, the tax must be collected from retailers because of the contention that has just been made, which lies back of the questions, I think, that have been asked: The insuperable job of collecting it from countless numbers of users. So, so far as possible, we attempt, and are relying upon this case of Monamotor Oil Company against Johnson to get the tax from retailers because it is obviously easier to get it from a hundred retailers than it is from ten thousand customers.

We didn't want to be faced with the embarrassing situation of requiring the retailer to collect it and have that retailer say, "Get the tax from the consumer," and then coming to Chicago or Indiana with a demand for the tax and have him tell us that we were not going to get it. We would be remediless. It would have been a very embarrassing and insufferable situation. So, in the process of drafting this legislation, we hit upon the plan of confining this obligation of collecting the tax, or the privilege of collecting it—some retailers want to do it—only to those who have a place of business in the state.

Now, the object of that is, first, to get jurisdiction over such retailer so that service of process can be had when we get a judgment against him and, secondly, so that he would have taxable values in the state that we could attach and levy execution on in support of that judgment.

Now, those are the big reasons back of it.

The State of California has the privilege of entering and auditing the books, say, of Sears-Roebuck & Company, to make sure that the sales, which have been through the home office, are reported by the branch office.

I do think, however, if the law is to work as effectively as is set out within its own provisions, reciprocal legislation is going to be required, but I don't think those difficulties, serious as they are, are insuperable. It is a difficult job, but it seems to me that the need of additional revenues of the states makes necessary some kind of effort of this kind, and it is my conviction that, whether you get federal legislation or what not, you are going to be faced with just the type of problem that Mr. Reynolds and you people are raising. It is a problem which is inherent in our system of government: that the state tax collection functions end at its boundary line, and the only remedy that I see for it is along the line of the very splendid step that has been taken by North Carolina. That legislation, alone, would be of immense value in all the states. I think it can go much farther, but it is an extremely encouraging thing. North Carolina has certainly done something.

MR. SMITH (Georgia): I am glad to hear that.

MR. WIMSEY (Illinois): Professor Traynor, if you had a mail order house in California which was shipping out to Nevada, for retail consumption, you say there would be no tax on the merchandise so shipped?

PROFESSOR TRAYNOR: No. This act applies only to goods which are consumed in the State of California.

MR. WIMSEY: It applies to Sears-Roebuck and concerns of that kind, outside of the state, which are shipping goods into the state?

PROFESSOR TRAYNOR: Yes, that is right.

MR. ———: Let us assume that I am a resident of California and I import a fur coat from, let us say, Marshall Field & Company, Chicago; and let us assume further that they have no local branch in California. If I follow the law, as a practical matter, I will make a return and pay the tax on the fur coat?

PROFESSOR TRAYNOR: Yes.

MR. ———: Purely from administrative standpoint, suppose I don't. Do I ever hear from it again? What efforts are made toward enforcement? Is there a check made of the receipt of the fur coat by me from Chicago? I am purely interested in enforcement and administrative efforts. Is there any attempt made to run me down?

PROFESSOR TRAYNOR: Well, our Act has just been in effect one quarter. We haven't audited the accounts of people like that. I think much can be done in the way of getting reports from express companies and railroad companies and from investigations by the investigators and administrators in the employ of the Board. As to many small things—say like jewelry and so forth—I imagine there will be much evasion—tax avoidance—but it won't be the first tax that has been avoided. Inherent in the nature of it, it has the difficulty which you mention.

Merchants Co-operate

MR. ———: Professor Traynor, have the mail order companies sought to defeat the purpose of this Act or are they co-operating with you?

PROFESSOR TRAYNOR: Yes, they are co-operating.

MR. ———: You are getting returns from branch offices of, say, Sears-Roebuck and Montgomery Ward?

PROFESSOR TRAYNOR: Yes, sir.

MR. FORT (Tennessee): I just want to say, Mr. President, that we have a use tax in Tennessee, applicable to tobacco. It was passed in July and it is working very well so far.

MR. PIERCE: There has been a good bit of discussion about the return from the branch in California. I think we will have to clarify that.

There is only one return, of course, made normally by any such corporation which may have a series of offices, of course, in California, but has its principal place of business, say, in Illinois. It makes a consolidated return. The home office reports for the entire business that it does for its branch offices in interstate commerce, and the form of our return is such that it really requires that to be done.

I have one of those forms here and it may serve to illustrate the method employed.

The return is entitled "Sales and Use Tax Return." Every one of these firms, of course, has to make a sales tax return. So it automatically gets this form. After the usual sales tax items, there appears, down here as an additional item, this: "Computations of use tax required to be collected from consumer," and, then: "Total sales price of tangible personal property sold for storage, use or other consumption in California and exempt from the retail sales tax as sales in interstate commerce or sales made outside this state." So that specific question is asked every retailer who does business in California and, if he makes a correct return, he has to put something down there if he actually did it, and, of course, as Professor Traynor said, all of these returns are subject to our audit.

There is, of course, a very definite, practical difficulty, to which he referred, that, in the event accurate accounts of these out of state shipments are not kept in California and the taxpayer should deny us access to its records, kept outside the state, our authority to go outside the state is, of course, as you know, exceedingly limited, but, if we were to have some sort of co-operation, for example, from the state of origin, as would be possible under the North Carolina statute, that difficulty would be met. However, quite aside from

that, it isn't as difficult as it might appear for the reason that we have very definite jurisdiction over the type of records to be kept by persons who are liable for the sales tax or the use tax as long as they are subjected to our jurisdiction at all and, as he has indicated to you, there has been no great difficulty.

Large Collection Indicated

Now, I suppose that you are all wondering, of course, what does it really pay? What is it producing? The revenue, naturally, would not be comparatively as large for the first quarter as you might anticipate later, but, even for the first quarter—that would be for the three months of July, August and September of this year—we have actually collected, thus far, considerably over three hundred thousand dollars from the use tax alone and, at that rate, it is very easy to see that the total collection will be at least a million and a half a year. I think it will be much nearer two million per year, conservatively. So, while that might seem something of a drop in the bucket as compared to our sales tax collections, which are in the neighborhood of sixteen million dollars a quarter, it is still a substantial item, and one reason why the sales tax collections have held up so well during the last quarter, I am reliably informed, is because of the operation of the use tax. A good many items that I think would not be reflected in the sales tax are there just because we have a use tax.

So from every standpoint it isn't merely an experiment in the great unknown, but we are actually doing something that we set out to do. We do not, of course, feel that it is an ideal form of taxation, for the very reasons that have been indicated: that is, that it is difficult to get returns from individual consumers who buy from merchants without places of business in California, but, between that horn of the dilemma and the dilemma of having our local merchants deprived of a lot of business because of the circumstance that we are unable to reach that type of interstate trade at all, we think that the difficulty in enforcement is to be preferred.

Links with Sales Tax

MR. DOYAL (Georgia): From your experience with it, you wouldn't think it would be a practical tax, from an administrative standpoint, unless you did have a general sales tax, would you? Suppose you just simply had the use tax. Wouldn't the cost of administration of just that tax alone be prohibitive?

PROFESSOR TRAYNOR: I think it would be really more effective in connection with the sales tax. It couldn't work otherwise anywhere outside the state.

MR. BROWN (Missouri): In our state, recently, a man from Blue Rock, Ohio, bought an automobile in the State of Missouri. We claimed that he should have paid us a tax and he did pay us a tax on an eight hundred and eleven dollar purchase. The sale was consummated within the state and we claimed it was taxable. Suppose that the State of Ohio had a use or consumer's tax. This automobile is to be used in Ohio. Would Ohio or would you in California, say, collect a use tax on that?

PROFESSOR TRAYNOR: Yes, we, in California, the way our statute is now written, would collect the use tax. There would be a double tax. In Washington there is provision made for that. That problem is essentially analogous to the problem that comes up in double taxation in income tax, for example, where residents are taxed upon income from all sources and non-residents from sources within the state. A non-resident is taxable upon the income that he earned in California. In the income tax laws, there is a provision that guards against it. Something like that, I think, should be worked out in this Act, but, writing a statute and getting all of the wrinkles out of it the first time you write it, then taking it from the typewriter to a Committee on Revenue and Taxation and getting it out of there with all of these things in it, is another matter, too. On some of those ideas that we had it wasn't so easy to convince a busy Legislature during the hurried days of the close of the session.

I think that you have put your finger on a very important point. We do not want to have double taxation. All we want to do is put our retailers upon equal terms with out-of-state retailers. Something should be done to avoid double taxation if this use tax idea is to spread.

MR. ———: May I ask one more question? You mentioned a while ago that you have access to the express companies' books.

PROFESSOR TRAYNOR: I think that access could be obtained as an accommodation to our state.

MR. ———: How about parcel post and the mails?

PROFESSOR TRAYNOR: No, sir, I don't think we could get access to those.

Russian Sales Taxes Numerous and High

Sales tax administrators who believe they are having a hard time making people "enjoy" paying their pennies may rejoice that they do not have the job of making Russian sales taxes popular.

Paul Haensel, writing in The Tax Magazine, reports tax rates on many articles in Russia. Here are some samples:

Toilet soap, 69 to 72%.

Cigarettes, 79.3 to 91%; cigars, 72%; tobacco, 79.3 to 80%.

Salt, 66% and higher in some cases; butter 26%.

Kerosene, 90.5% in cities and 93% in villages.

Ice cream, 33%; ice cream containing eggs, 26%.

Ready-made clothing, 3.5%; knit wear, 38%.

Mirrors, 40%; china, 8%.

Sports goods, 21%; rayon goods, 71%; trunks, 25%.

Vodka, 88.8%.

INDIANA CHAIRMAN WELCOMES VISITORS

By PHILIP ZOERCHER

Chairman, Indiana State Board of Tax Commissioners, and President of The National Tax Association

Mr. President and Members of the National Association of State Tax Administrators:

It gives me a great deal of pleasure to welcome you to the State of Indiana, sometimes known as the "Crossroads of America." Of course, I know you people from the West think that we are a little presumptuous in thinking that Indiana is the crossroads, but, if you listen to our radio programs, you will find that that is what they have designated the State of Indiana. Indianapolis is the "Crossroads of America."

Certainly there is nothing of greater imimportance to the people of every state than the question of taxation and with it, of course, goes the administration of these different tax measures.

A great deal of good can come from meetings of this kind. Different states have different methods and there may grow a unanimity of spirit and feeling if we get together and discuss these matters.

There is another thing that we tax men know. As I sometimes tell our own people, our own field men, when they come to me, there are two ways of approaching the public, the taxpayer. You can approach him with a frown or you can approach him with a smile and you can leave the taxpayer in a better spirit if you adopt the latter than if you adopt the former; that is, if you smile. You can be just as determined and just as firm in what you say, and sometimes the taxpayer will go away with a different spirit, and I know, from the looks of you folks here, that you are that class and believe in that spirit.

I hope and trust that you will have a very successful meeting and it is useless for me to tell tax men that, if you have a different opinion from that expressed by anyone, don't hesitate to express it because, by differences of opinion, in getting together we will iron out our difficulties and have a real system of taxation in our different states.

Thank you, Mr. President. (Applause.)